IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1511

CHARLES MURPHY, et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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ARGUMENT

Subsequent to the filing of the original Petition for a Writ of Certiorari, two decisions were rendered which touch on issues before the Court. The United States District Court for the Eastern District of Missouri rendered its decision in the case of *Liddell, et al. v. Board of Education, et al.*, on April

12, 1979. The Memorandum of Findings of Fact and Conclusions of Law appears in the appendix of the Brief of the Respondents in Opposition to the Petition for Writ of Certiorari on page A-29. Specifically the Presiding Judge, Judge James H. Meredith, held:

> "The Court has specifically found that there has been no intentional segregation of students by the actions or inactions of the Board and that there has been no constitutional violation by the Defendants." (Respondents' Brief, page A-29).

Surprisingly enough, after having found no Constitutional violation, the District Court then ordered:

> "In light of this finding, the Court directs that the formulation of any plan under the Consent Decree have as its goal quality education, which includes integration of the races where practical and feasible." (Respondents' Brief, page A-29.)

The issue as to the validity of the Consent Decree as originally proposed in the Petition for A Writ of Certiorari, was whether a Federal Court may judicially require or approve a Consent Decree requiring the assignment and transfer of individuals solely on a racial basis in the absence of a determination that the assignment and transfer is required to overcome prior discriminatory conduct on the part of the employer. (Petition for Writ of Certiorari, page 3.) The issue is now even more clearly defined, and the issue is now whether, in the face of a specific judicial determination that racial discrimination has not been practiced, may a federal district court still order a plan of integration.

The second decision rendered is that of the Second Circuit Court of Appeals in *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 78-7274 (Decided April 17,

1979). The District Court had made a specific finding that the New York School Board had not illegally nor unconstitutionally discriminated against its students or employees, but nonetheless authorized and ordered the School Board to implement a plan the School Board devised to reduce isolation and achieve racial balance. *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 451 F.Supp. 1056, 1077 (S.D. N.Y., 1978). The Second Circuit reversed on the basis that the District had found no liability. Writing for the Second Circuit, Judge Murray Gurfein noted that the Court was "compelled to reverse the district judge's order" requiring achievement of racial balance. ". . . the judge lacked authority under controlling law to compel the school authorities to implement an affirmative plan designed to achieve racial balance." *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 78-7274 (2 C.A. April 17, 1979).

In 1977 the Board of Education of the City of St. Louis filed its Petition for Writ of Certiorari, which writ was denied, 433 U.S. 914 (1977) seeking a review of the decision of the 8th Circuit Court of Appeals in *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768 (8 C.A., 1976). In its Petition for a Writ of Certiorari, the Board of Education of the City of St. Louis, in part, stated:

> "The Appellate Court erroneously undertook to set binding parameters for the plan to be adopted by the District Court. Not only was there no finding of Constitutional violation made by the District Court, but its findings of fact stand unreversed. Hence the prescription for the remedy set forth by the Appellate Court reaches beyond the scope of the consent judgment and decree without any finding to warrant or support it."

The Respondents here sought, in that case, to overturn the ruling of the Eighth Circuit Court of Appeals, part of which ruling stated the Court's opinion that:

"The Board of Education of the City of St. Louis has operated an 'admittedly de jure segregated school system whose district lines have been coterminus with those of the City since 1876.' " *Liddell, et al. v. Caldwell, et al.*, 546 F. 2d 768, 772 (8 C.A. 1976).

While this Court did not grant certiorari at that time, the issue as to a Federal Court's jurisdiction to order a plan of integration in the absence of a specific judicial finding of intentional segregation was first raised by the Respondents in this case. The issue is even more sharply defined by the decision of Judge Meredith specifically finding no discriminatory intent or constitutional violation on the part of the Respondents here. Given the rather clear differences in the decisions of Judge Meredith and the Eighth Circuit Court of Appeals as to the validity of the Consent Decree and the decision of the Second Circuit, it would be most appropriate for this Court to grant certiorari of this cause. We do not, in any way whatsoever, mean to detract or withdraw any of the earlier arguments made in the original Petition for Writ of Certiorari. The purpose of this supplemental or reply memorandum is merely to bring to this Court's attention a change or continuing development of legal issues which have occurred since the filing of the original Petition for a Writ of Certiorari.

In further support of this point, we would further define and refer to this Court's language in *Regents of the University of California v. Alan Bakke*, 438 U.S. 265, 57 L.Ed.2d 756 (1978). In striking down the racially exclusive admissions policies at the University of California Medical School, this Court stated that it was rejecting the petitioner's comparison to its specific situation to the decisions in school desegregation cases. This Court stated:

"The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. (Citations omitted.) Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed to the extent of the violations. (Citation omitted.) Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of the University of California v. Alan Bakke*, 438 U.S. 265, 300-301, 57 L.Ed.2d 756, 777-778 (1978).

". . . but we have never approved preferential classifications in the absence of proven constitutional or statutory violations." *Regents of the University of California v. Alan Bakke*, supra, 438 U.S. at 302, 57 L.Ed.2d at 778-779 (1978).

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such finding of constitutional or statutory violations, it cannot be said that the Government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." *Regents*, supra, 438 U.S. at 307-308, 57 L.Ed.2d at 782-783 (1978).

"Respondent urges—and the courts below have held—that Petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of the University's admission program, the question remains whether the program's racial classification is necessary to promote this interest."

". . . Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Regents*, supra, 438 U.S. at 314-315, 57 L.Ed.2d at 786-787.

"In summary, it is evident that the Davis Special Admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of seats in an entering class. No matter how strong their qualifications, quantitative or extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seat. At the same time, the preferred applicants have the opportunity to compete for every seat in the class."

". . . But when a state's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden." *Regents*, supra, 438 U.S. at 319-320, 57 L.Ed.2d at 789-790.

It is therefore the position of the Petitioner that this cause was improvidently removed from the State Court, which has exclusive jurisdiction, that the Motion to Remand was improperly denied, and a Motion to Dismiss was improperly sustained. The Consent Decree, originally resisted by the Respondents here and now embraced by them, may not be approved or imposed by the Federal District Court, since it no longer has jurisdiction of the cause, having found no constitutional violation, and the matter

ought properly be remanded to the State Court for a determination as to the reasons for the classification of the employees of the Respondent by race, and the validity of the decision of the Respondents in this case to assign its employees based exclusively on their race.

Respectfully submitted,

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